139-624

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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. 277.

EARL PHILIP MASON, WILLIAM P. CHAPIN, SAMUEL L. PECK, EDWARD E. ARNOLD, AND J. FRANK GREENE, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM H. ROBERTSON, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**FILED OCTOBER 22, 1887.**

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Earl Philip Mason, William P. Chapin, Samuel L. Peck, Edward E. Arnold, and J. Frank Greene, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the part- aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of October term, eighteen hundred and eighty-seven, to wit, the 24th day of October, 1887, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 17th day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.
E. H. LACOMBE, *Judge.*

2 [Endorsed:] E. & A. A. 715. 10176. U. S. Supreme Court. Earl P. Mason & *al.*, plaintiffs in error, against W. H. Robertson, defendant in error. Writ of error. Due service of a copy of the within is hereby acknowledged this 17th day of October, 1887. Stephen A. Walker, —, U. S. att'y, for def't in error.

[Stamped:] U. S. circuit court. Filed Oct. 17, 1887. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
*Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Earl Philip

Mason, William P. Chapin, Samuel L. Peck, Edward E. Arnold, and J. Frank Greene, plaintiffs in error, against William H. Robertson, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-first day of October, in the year of our Lord one thousand eight hundred eighty-seven, and of the Independence of the United States the one hundred and twelfth.

Seal of U. S. Circuit Court, South. Dist. New York.

TIMOTHY GRIFFITH, *Clerk.*

3 United States Circuit Court for the Southern District of New York.

EARL PHILIP MASON, WILLIAM P. CHAPIN, SAMUEL L. PECK, EDWARD E. ARNOLD, & J. FRANK GREENE
*against*
WILLIAM H. ROBERTSON.

To the above-named defendant:

You are hereby summond to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 3 day of December, in the year one thousand eight hundred and eighty-five.

[L. S.]

TIMOTHY GRIFFITH, *Clerk.*

HARTLEY & COLEMAN,
*Plaintiffs' Attorneys.*

Office and post-office address, 62 Wall street, New Yark city.

4 [Endorsed:] United States circuit court, southern district of New York. E. P. Mason *et al. vs.* W. H. Robertson. Summons. Hartley & Coleman, plaintiffs' attorneys. Served Dec. 3, 1885. Received U. S. attorney's office Dec. 14, 1885.

UNITED STATES OF AMERICA,
*Southern District of New York,* } *ss:*

I hereby certify that on the — day of ——, 18—, at ——, I personally served the within summons on the within-named defendant by showing — the same and delivering to and leaving with — true cop- thereof.

—— ——,
*U. S. Marshal.*
By —— ——, *Deputy.*

5 U. S. Circuit Court, Southern District of New York.

EARL PHILIP MASON, WILLIAM P. CHAPIN, SAMUEL L. Peck, Edward E. Arnold, & J. Frank Greene, Plaintiffs,
*vs.*
WILLIAM H. ROBERTSON, Defendant.
} Complaint.

Plaintiffs complain—

1st. That defendant was during the times hereinafter named collector of customs of the United States at the port of New York.

2d. That plaintiffs were during said times partners in trade under the firm name of Mason, Chapin & Company, and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That plaintiffs, in order to obtain said goods, were com-
6 pelled to pay the defendant as such collector the sum of three hundred & sixty-four $\frac{27}{100}$ dollars in excess of the lawful rate of duty on said goods and of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

5th. That plaintiffs made due and timely appeals on each entry to the Secretary of the Treasury, who affirmed the decision of the defendant.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess of the filing of the said protests, of the appeal to the Secretary of the Treasury and of his decision
7 thereon, if rendered, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum so exacted as aforesaid, with interest from March 3d, 1885, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
*Attorneys for Plaintiffs.*

8 *Bill of Particulars.*

Importers: Mason, Chapin & Co.

| Description of goods. | Vessel and whence imported. | Invoice. | Date of entry. | Payment of excessive duty. | Amount of excessive duty. | Date of— | |
|---|---|---|---|---|---|---|---|
| | | | | | | Protest & appeal. | Decision. |
| Bichromate of soda. | Western-land, from Antwerp. | 1<br>Feb'y 7 | 8<br>Mar. 3 | 85.<br>Mar. 3 | $364 27 | 18<br>Prot. No. 5468.<br>March 31 | 85.<br>Sept. 30th |

9 (Endorsed:) 10176. U. S. circuit court, southern district of New York. Earl P. Mason *et al.* ag't William H. Robertson. Complaint and bill of particulars. Hartley & Coleman, pl'ffs' att'ys, 62 Wall St., New York city. Received Dec. 15, 1885, U. S. attorney's office.

10 Circuit Court of the United States for the Southern District of New York.

EARL P. MASON & *als.*
*vs.*
WILLIAM H. ROBERTSON, Collector, &c.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to
11 the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

V. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise and were forthwith before the com-
12 mencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the com-
13 plaint be dismissed with costs.

STEPHEN A. WALKER,
*United States Attorney, Attorney for the Defendant.*

(Endorsed:) U. S. circuit court, southern district of New York. Earl P. Mason & *al. vs.* W. H. Robertson, collector, &c. Answer. Stephen A. Walker, U. S. attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, June 19, 1886. Hartley & Coleman, plaintiffs' attorney-. To H. & C., plaintiffs' attorney-.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 26th day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Nathaniel Shipman, judge.

EARLE PHILIP MASON, WILLIAM P. CHAPIN, SAM'L L. PECK, EDWARD E. ARNOLD, & J. FRANK GREENE *v.* WILLIAM H. ROBERTSON. } 10176.

Now come the plaintiffs, by Hartley & Coleman, Esqrs., their attorneys, and move the trial of this cause; likewise come- the defendant, by Henry C. Platt, Esq., ass't U. S. attorney, his attorney; thereupon a jury is impanneled and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel on Thursday, January 27, 1887, the court directs the jury to find a verdict for the defendant; thereupon the jury render a verdict whereby they find for the defendant. It is—

Ordered that the plaintiffs have a stay of proceedings on said verdict for sixty (60) days.

A copy.
[L. S.] TIMOTHY GRIFFITH, *Clerk.*

15 United States Circuit Court, Southern District of New York.

EARL P. MASON & *al.* *vs.* WM. H. ROBERTSON. } N. S. 10176. Judgment.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury at a circuit court of the October term, 1886, and the issues having been tried and a verdict for the defendant having been duly rendered on the 26th day of January, 1887, and his costs having been adjusted at $46.85—

Now, on motion of Stephen A. Walker, United States attorney, for defendant—

It is adjudged that the defendant have judgment against the

plaintiffs upon the issues in this action, and that he recover the sum of $46.85, his taxed costs, and have execution therefor.

Judgment signed this eleventh day of October, 1887.

JOHN A. SHIELDS,
*Deputy Clerk.*

16 [Endorsed:] 10176. United States circuit court. Earl P. Mason & *al. vs.* Wm. H. Robertson. Judgment-roll. Stephen A. Walker, United States attorney, for defendant. Filed —— —, 187–. Costs, $46.85. U. S. circuit court. Filed Oct. 11, 1887. Timothy Griffith, clerk. 1.30 p. m.

17 U. S. Circuit Court, Southern District of New York.

E. P. MASON *et al.*
*vs.*
W. H. ROBERTSON. } No. 10176.

Be it remembered that this action came on for trial before the Honorable Nathaniel Shipman, judge, and a jury, at a stated term of this court held at the city of New York, in said district, on the 25th and 26th days of January, 1887, whereupon the following proceedings took place, viz: The plaintiffs, to maintain the issues on their part, introduced evidence tending to show that in the year 1885 they imported at the port of New York, by the steamer Westernland from Antwerp, 30 casks of bichromate of soda weighing 17,227 lbs., valued at marks 3,325.85; that upon said importation the defendant, as collector at the port of New York, under color of the following item in Schedule A, chemical products of the tariff act of March 3, 1883, viz., bichromate of potash, three cents per pound, and § 2499 of the Revised Statutes, levied and collected upon said importation, as a non-enumerated article assimilating to bichromate of potash, a duty of three cents per pound.

Said duty was paid under the following protest, viz:

18 NEW YORK, *March* 31, 1885.

SIR: We protest against your decision as to the rate and amount of duties to be paid on the bichromate of soda entered by us for consumption March 3, 1885, per Westernland, # 26214, from Antwerp, because it is a chemical compound and salt not specially enumerated or provided for, dutiable at 25%, as such under Tariff Schedule A. We pay the excess exacted under compulsion solely to get the goods.

MASON, CHAPIN & CO.,
By HARTLEY & COLEMAN,
*Attorneys, 62 Wall Street.*

Collector of customs, New York city.

It was further proved that plaintiffs had complied with the various provisions of law as to appeal, the commencement of suit, &c.

Evidence was further introduced on behalf of the plaintiffs that

the article was bichromate of soda, bought as such and sold as such; that they had imported but two lots of this as a commercial article, each in the year 1885; that they did business in New York, Providence, and Boston; that besides importing the article they bought it as a domestic article.

JOHN W. MAGEE, a dealer in chemicals and dye-stuffs in the city of New York, testified that he was familiar with both bichro-
19 mate of soda and bichromate of potash; that they were not the same articles commercially nor would one be furnished under an order for the other.

Q. Is there a difference in the price of these two articles?

A. Yes.

Q. One costing how much more than the other?

Mr. PLATT: How is this material? I object.

The WITNESS: About a cent and a half.

The COURT: No; I don't think it is important.

If he were asked as a dealer in chemicals and dye-stuffs for a chemical compound he should probably ask which one, as there are several, and if asked for a chemical salt he would not know what particular article was wanted, but if asked for a chemical salt he would know that an acid was not wanted.

A chemist, Professor HENRY MORTON, president of the Stevens Institute, of Hoboken, N. J., testified in behalf of plaintiffs that the commercial article of bichromate of soda is a reddish salt or substance, sometimes of a clear red, crystalline form and sometimes opaque and rather of a yellow red. It dissolves very freely in water and even attracts moisture from the air, so that in a damp situation it will become wet from the air. It is both a chemical compound and a chemical salt, chemical salts being merely one class of chemical compounds.

Bichromate of potash is not the same article as bichromate of soda. It is chemically a different substance and it differs in
20 physical properties, so that it is quite easy to recognize or distinguish one from the other.

On cross-examination by defendant's counsel the witness further testified—

That he had never sold bichromate of soda, but had bought it by simply asking for it or sending for it to dealers in drugs, and had used it in his laboratory; that he had never dealt in it, but had used it as a chemist in the preparation of different chemical substances; that the older form of chemical nomenclature was the one used nowadays commercially, under which bichromate of soda would commercially, rather than in a strict scientific sense, be said to be a compound of chromic acid and soda, and bichromate of potash would be said to be a compound of chromic acid and potash. Soda and potash are both alkalies. The effective ingredient would depend upon the use they were applied to. In the manufacture of some colors and dye-stuffs the chromic acid, and in other cases the soda or

potash, as the case might be, would be the important part. In the manufacture of chrome yellow of the best quality potash gives a better product than soda, because the first forms, as a rule, insoluble and the latter soluble salts.

Bichromate of potash is a very insoluble salt. It crystallizes out readily from solution in fine, large, distinct crystals easily purified.

Bichromate of soda, on the contrary, does not so crystallize.

21 It is very difficult to make it crystallize. It is therefore customary simply to evaporate it to dryness. This makes the great difference in getting a pure article. If it will crystallize out, then all the impurities are lost in the mother liquor and will drain away and we get the pure crystal remaining, while a body that becomes solid in solution cannot be purified in that simple and easy way, and perhaps not at all.

Being asked on his cross-examination the following question by defendant's counsel, viz: "What are the uses to which bichromate of soda and bichromate of potash are put commercially?"—

The plaintiffs' counsel objected thereto as irrelevant and immaterial. The court overruled this objection of plaintiffs' counsel, who thereupon excepted to this ruling of the court. The witness then testified that bichromate of potash has long been used in the preparation of chrome yellow and in the manufacture of artificial madder or alizarine and anthrachinone. It is also used in large quantities in galvanic batteries and in the manufacture of certain kinds of inks. As to the uses of bichromate of soda I know by hearsay that it has been used in the alizarine works. I do not know that it has been successfully used in the manufacture of chrome yellow. I think it has been used in galvanic batteries. The use of bichromate of soda commercially is comparatively recent as compared with bichromate of potash, I believe, although the substance was known very long ago.

22 ERNEST KLIPSTEIN testified for the plaintiff that he was a dealer in chemicals and dye-stuffs, dealing both in bichromate of soda and bichromate of potash, and that they were different commercial articles.

On cross-examination he testified that both were sold to color-makers, dyers, and printers, but not for the same purposes.

Q. Are you familiar with the appearance of the two articles?
A. Yes, sir.
Q. Do they resemble each other at all?

Plaintiffs' counsel objects as irrelevant, immaterial, and improper. Objection overruled, and plaintiffs' counsel thereupon excepts to the ruling of the court.

A. When both are crystallized they have some resemblance; but they are easily distinguished.
Q. What are the uses of bichromate of potash in trade and commerce?

Plaintiffs' counsel objects on the ground that both bichromate of

soda and bichromate of potash are enumerated under the tariff at different rates of duty and as separate articles, and that any testimony offered for the purpose of assimilating the two under the similitude rule of the tariff—§ 2499 Rev. Stats.—is incompetent, immaterial, irrelevant, and improper. Objection overruled, and plaintiffs' counsel excepts to said ruling of the court and gives notice then and there that all testimony offered for the purpose
23 of showing a similitude, either in material, quality, texture, or the use to which it may be applied, between bichromate of soda enumerated as a chemical compound and salt by whatever name known, &c., and bichromate of potash throughout the trial will be understood as being given under the like objections, ruling, and exception if admitted.

Answer. It is used for making chrome yellows and for dyeing—in making different colors in dyeing and printing. Bichromate of soda I do not think is used much for making chrome yellow; they have never been able to do so, so far as I know, to any extent. Bichromate of soda is used mostly in dyeing, in producing blacks on cotton, very largely on cotton and wool, &c., and for a great many dyeing processes. For some reason or other bichromate of soda has not been used for making chrome yellow; it has not been practicable to work it. When the article came into use I tried to sell it for that purpose and it was universally rejected by all chrome-yellow makers. We sell it chiefly for dyeing. I have heard, I believe, that it is used in batteries, but I never sold it for that purpose.

ISAAC W. DRUMMOND, a witness for the plaintiff, testified that he was a chemist by profession, engaged in that capacity for F. W. Devoe, color manufacturers, in New York city, and they are engaged extensively so manufacturing.

That he obtained his chemical education under Professor
24 Charles F. Chandler, at the school of mines, Columbia College, New York, some ten years ago.

The meaning of a chemical compound is that it is the union of two or more bodies the resulting characteristics of which do not partake at all of the characteristics of the two bodies thus united. A salt is a combination of an acid and a base. A base, generally speaking, is the union of a metal and oxygen. Bichromate of soda is a salt composed of an acid, chromic acid, and a base, sodium. Sodium is a metal. Bichromate of potash is also a salt. It is a combination of an acid, chromic acid, and the base, potash. Potash and soda are two different bases. I am practically acquainted with both bichromate of soda and bichromate of potash. We have bought the former and both buy and sell the latter. I have several times used bichromate of soda in my business for the manufacture of chrome yellows. The results have been unsatisfactory, not what we should care to sell; what the reason is I do not know. We manufacture colors largely and chromate of lead in large quantities, which we make of bichromate of potash and nitrate of lead.

Chemical compounds, salts, and alkalis are extensively used as a class in color making and dyeing, and are the tools of trade, so to

speak, of those industries. There is a difference in price; there is a difference also in solubility between bichromate of soda and bichromate of potash, and, as ordinarily found in commerce, a difference in appearance.

25 Q. As usually found in commerce is there much difference in appearance between bichromate of soda and bichromate of potash?

A. Yes, sir.

Q. What is the difference?

A. Bichromate of potash crystallizes in large, bright, orange-red pebbles and the bichromate of soda which is generally in commerce is rather an amorphous body and is not at all as brilliant as the bichromate of potash. It has been evaporated instead of crystallized.

Q. Will you illustrate that by these specimens that I show you?

A. (Referring to lump.) That is a crystallized product of bichromate of potash. You see it is very brilliant. The color is very high. It crystallizes in rather perfect crystals. That (in the bottle) is bichromate of soda which has an amorphous constituency. It hardly shows any crystallized form and is very dark in color as compared with the bichromate of potash. It is a very delicate question when it comes to the air. This (referring to sample—another bottle) is also another sample of bichromate of soda which is in very fine grains. It also has very little characteristics of crystallization.

Q. And as presented there, is that the way it usually comes in commerce?

A. That is the way I have bought it, sir; yes, sir.

On cross-examination the witness testified that he consid-
26 ered Dr. Chandler a high authority; that there are a great many chemical compounds or salts; that the active and desirable ingredient in both these salts is the chromic acid, the base in one instance being potash and the other soda.

On his redirect examination he testified that bichromate of soda as a tinctorial agent had been brought to his notice within four or five years, but it had been known as a chemical salt in chemistry for a very long time—perhaps for fifty years—and named in all the leading chemistries. He found references to it in 1831. Witness further read from a "Practical Treatise on Dyeing and Calico Printing," published at New York in the year 1860 by Robert McFarland: "Soda is sometimes used instead of potash in the preparation of a salt of chrome. It answers the purpose of the dyer equally well."

Chromic acid gives a different result when combined with potash from what it does when combined with soda in the business of color-making. Chromic acid may be combined with other bases like ammonium, lime, or almost any base.

Q. In regard to the manufacture of these articles, are they made direct from chromic acid or by a long process from chromate of iron?

A. The chromium that is found in nature is found combined with iron, and that has to be extracted from the iron before it is combined

with potash or soda in order to form the bichromate of soda or bichromate of potash.

27 JOHN CAWLEY, a witness for the plaintiff, testified that he was a chemist in the color works of James P. Barnett, at Newark, N. J.

That he had used bichromate of soda quite largely for making colors, principally chrome yellows. We used it to replace bichromate of potash, and we found that we had to devise an entirely new process in order to use it in that way.

On cross-examination he testified that in using bichromate of soda in making colors they failed to get the colors they used to get, and have still to use bichromate of potash for those colors. The desirable ingredient for us in both these salts is chromic acid. The potash or soda are vehicles that carry the chromic acid. Bichromate of soda, in the nature of the case, cannot be as pure as bichromate of potash. We endeavored to use it for the latter, but couldn't.

Q. Hasn't it been brought in here in recent years, and in trade and commerce in this country, and used as a substitute for a great variety of uses for bichromate of potash?

Objected to by plaintiffs' counsel as immaterial and incompetent and improper for reasons hereinbefore stated in former exception. Objection overruled. Plaintiff excepts.

Answer. Yes, sir; besides chrome yellow it is used in making blacks, wood lakes, and such colors. The resulting color
28 when bichromate of soda is used is altogether different and inferior from that when bichromate of potash is used, although you get as much chromic acid from the one as the other. In some cases we have devised methods, after a great deal of labor and a great deal of loss, to still use it, because it is cheaper than bichromate of potash. We should never think of using it at the same price for each. We only use it to make some chrome yellows; not all. We have been using it on a large and small scale for the past three years.

Here the plaintiffs rested their case.

Evidence was then introduced on behalf of the defendant:

CHARLES F. CHANDLER, professor of chemistry in Columbia College, New York, testified that he was acquainted with the articles known as bichromate of soda and bichromate of potash.

Q. Will you state what the difference or similarity is between them?

By PLAINTIFFS' COUNSEL: Under the similitude law, do you mean?

DEFENDANT'S COUNSEL: I am asking for the difference or similarity of those two things.

PLAINTIFFS' COUNSEL: Well, if your honor please, if the question is to be whether they are the same constitutions of matter or composition of matter I have no objection to the question; but if it is

to show that these articles are similar one to the other for the
29 purpose of invoking the similitude law in this case I object to the question as immaterial and irrelevant.

After argument the court overruled said objection; to which plaintiffs' counsel excepted.

Answer. They are almost absolutely identical. The difference is in the base or metal, which in the one case is potassium and the other sodium. These are two alkaline metals, which are mere vehicles for the other constituents of the salt, and for practical purposes it is immaterial which of these metals is present. There is no chromic acid in either of these salts. It is a compound of the metal potassium in one case and the metal sodium in the other with a certain oxide of chromium, but there is no chromic acid present. So far as the chemical properties of the two salts are concerned, they are identical for every purpose for which the salts are employed, and may be applied to the same uses and with equal results. A chemical salt may be defined as an acid in which the hydrogen has been replaced by a metal or an electro-positive group of elements. Familiar examples of salts are common salt, ordinary fats, many ethers are salts, oil of wintergreen, stearine. The fats are salts of propenyl. Spermaceti is a salt, chemically speaking, and soap—hard soap—is stearate of sodium chiefly.

On cross-examination he further testified that bichromate of soda and bichromate of potash were both chemical compounds and salts, and that he never had any practical experience in manufacturing, only in the laboratory.

30 VICTOR J. BLOEDE, a witness for the defendant, testified that he was a manufacturing chemist, living in Baltimore; that he has been a manufacturing chemist for fifteen years; that he made a specialty of chemicals and their application to fibers and fabrics and colors, and was acquainted with the articles commercially known as bichromate of soda and bichromate of potash. The first commercial sample of bichromate of soda I believe I saw was in 1884. Prior to that time I think it had not been known or used commercially in this country. The useful ingredient in both bichromate of soda and bichromate of potash is the chromic acid.

Q. What is the difference or similarity between these articles?

Objected to by plaintiffs' counsel as immaterial, irrelevant, and incompetent and improper, and furnishing no foundation for the introduction of evidence under § 2499 Rev. Stats. Objection overruled by the court, and plaintiffs' counsel excepts.

Ans. I consider them practically for all manufacturing purposes identical.

Q. Can they be used for the same purposes?

A. They can for all purposes, I think.

Q. With the same results?

A. With the same results. I so use them myself.

Q. What are they used for?

A. They are used in dyeing and printing of textile fabrics in various colors, form part of brown colors in dyeing black,
31 purple, blue, and yellows, oranges, and also for the manufacture of pigment colors, yellows and oranges mainly. In a general way I am acquainted with the manufacture of the two articles. I think the processes of their manufacture are practically the same.

Q. Has the introduction of bichromate of soda given rise to any new use, or is it simply used as a substitute for bichromate of potash in trade and commerce?

Objected to by plaintiffs' counsel as immaterial, irrelevant, incompetent, and improper, for the reasons hereinbefore stated as to the introduction of evidence under § 2499 Rev. Stats. Objection overruled by the court, and plaintiffs' counsel then and there excepts.

Ans. It has given rise to no new use; it is simply used as a substitute.

On cross-examination by plaintiffs' counsel the witness further testified that he was president of the Baltimore Chemical Company; that he gained his experience with these articles in their application to his own work in his own manufactory, he being a manufacturer of colors and dye-stuffs for dyers and printers, in which business he used both bichromate of potash and bichromate of soda quite largely. Lately he had used the latter instead of the former. The former is composed of chromic acid combined with potash, the latter of chromic acid combined with soda. Theoretically speaking, the resulting products are chemically different. In their use they are
32 not. As a matter of fact, as constitutions of matter they are different. I heard Dr. Chandler say there was no chromic acid in either of these articles. They are chemical salts. If one should send me bichromate of soda when I wanted bichromate of potash I should not accept it as filling the order. There is a difference in the commercial value. There is no difference in the uses to which they are to be applied or in the way they are to be used; none whatever. Exposed to the air, bichromate of soda absorbs moisture and becomes damp. Bichromate of soda is capable of being stored up and kept in stock for a year in the ordinary way as you preserve any package in barrels or casks. We make various printing colors, which applied to the fibre and put through the process of calico printing and dyeing become black. We also make pigments the compound of lead and chrome known as chrome yellow. Chromate of lead is chrome yellow. There are a great many varieties of it. I have made all, but not as a regular thing. There is a difference in price according to the shade. I cannot state whether bichromate of soda would make American vermilion or not.

Redirect:

To extract chromic acid, if we desire to extract it, or for certain colors where the chromic acid is to be developed we add to bichro-

mate of soda or bichromate of potash sulphuric acid. We make the chromic acid by adding sulphuric.

Recross:

33 I stated the chromic acid was the valuable ingredient in these two articles. It is necessary to have soda or potash as a vehicle for the acid in the production of colors. You may have soda, potash, ammonia, or any other vehicle. You can't practically as a business use the chromic acid unless you have a vehicle for it. Theoretically you could, practically you can't. But this vehicle is simply for the purpose of manipulation and has nothing whatever to do with the resulting color.

THOMAS C. HUNTER, a witness for the defendant, testified that he was a chemist in the calico printing, dyeing, and chemical manufacturing business in Philadelphia with the old house of James and John Hunter, print works, and used both bichromate of potash and bichromate of soda in his business, but principally the former.

Q. Will you state to what uses in your business these articles are put?

Plaintiffs' counsel objects to the question as immaterial, irrelevant, incompetent, and improper, for the reasons hereinbefore stated as to the introduction of evidence under § 2499 Rev. Stats., and, being overruled by the court, then and there excepts to such ruling.

The witness then testified that these salts were used principally by him to discharge indigo; also as a mordant for blacks and other shades of colors in calico printing; also for raising aniline blacks after they were printed and for other purposes; that both
34 articles were used by him for the same purpose with equal result.

On cross-examination by plaintiffs' counsel he further testified:

Q. You say you have used principally potash?

A. Yes.

Q. These articles are identical, practically?

A. Practically.

Q. Why is it, then, if these articles are practically identical and soda is cheaper than potash—what makes you use bichromate of potash?

A. The difference is so trifling in price that for our purpose we haven't thought it worth while to change.

Q. Then you used bichromate of soda at one time, you say?

A. To some extent.

Q. Why did you change to potash, then?

A. We merely used the soda salt experimentally to see whether it was worth the difference.

Q. And you found it was not, did you?

A. Yes; they were so near identical. The first reason for our using it was that the salt for some time came in without paying the full duty, and that is the reason for our experiment. If it had continued to do so we would have used the soda salt.

Q. Is it not a fact that there is more chromic acid in a pound of bichromate of soda than there is in a pound of bichromate of potash?

A. I have never tested this.

Q. You don't know.

A. Theoretically there should be more in the soda salt.

Q. Theoretically there should be more of the useful ingredient—this chromic acid—in the bichromate of soda than there would be in the bichromate of potash?

A. Yes.

Q. Then why don't you use it—why don't you use the
35 bichromate of soda all the time?

A. I told you the reason.

On his redirect examination, having produced samples of calico dyed with indigo and discharged with the soda salt, and also with the potash salt, he further testified on his recross-examination:

Q. In regard to those two articles couldn't you get the same practical results by other tinctorial agents—other oxidizing agents?

A. You mean get a discharge on indigo?

Q. Yes; produce the same color.

A. We—the white is the part that is printed in this case.

Q. It is the blue you get?

A. No; the blue is dyed first, dyed in the piece, and then the chromate or bichromate is printed on the indigo and afterwards passed through acid, which liberates the chromic acid—the useful ingredient in this case.

Q. Suppose you used chlorine; wouldn't it give you the same thing?

A. You could do it, but with danger of tendering your cloth.

Q. Couldn't you do it with some other oxidizing agent and get the same color?

A. Yes; it could be done.

Q. Take any good oxidizing agent; you could do the same thing, couldn't you?

A. Not any; no.

Q. Any good one—any suitable one?

A. Any suitable one you could for this particular purpose.

Q. What suitable ones are there besides this soda and potash?

A. Well, this is the practical method. The others are
36 either more expensive or else dangerous to the fibre, or there is some other reason why they are not used.

Q. I ask you, as a fact, whether they could not be produced; you say they could?

A. They could; yes.

Q. You mentioned chlorine as one; what other one is there?

A. There are a number of others; chlorine alone is not an available method; you have to use it in connection with something else. Bichromate of soda and bichromate of potash are both chemical compounds and salts.

CONRAD SEMPER, a witness for the defendant, testified that he was a chemist living in Philadelphia; that he had been a practical chemist for the last 20 years and was now with the firm of Harrison Bros. & Co.; that he was acquainted with and had used both bichromate of soda and bichromate of potash.

Q. Are they applied to the same uses?

Plaintiffs' counsel objects to the question and to the testimony offered under § 2499 Rev. Stats. as immaterial, irrelevant, incompetent, and improper on the grounds hereinbefore stated, and, being overruled by the court, then and there excepts to such ruling.

Answer. They have been applied to the same uses with equal results.

Q. Do you know how long this bichromate of soda has been used and dealt in in the trade and commerce of this country commercially?

37 Plaintiffs' counsel objects on the ground that it is immaterial.

The objection being overruled, plaintiffs' counsel excepts.

Ans. I have heard of it about three years ago for the first time—three or four years ago; I don't remember the exact time.

That was the first I knew of it commercially.

Upon his cross-examination he testified that bichromate of soda was a chemical compound and salt, and so, too, was bichromate of potash.

Upon his redirect examination he further testified that he made chrome yellow with both these salts and produced samples, one made with the soda salt and the other made with the potash salt, and he could not tell which was so made unless he had the other one beside it. He further testified on his recross-examination by plaintiffs' counsel that it was possible to make with bichromate of soda, as well as with bichromate of potash, the shades of chrome yellow known as orange, medium, and lemon, but they had never done it; they had never made all the shades with bichromate of soda; they had made similar chromes to the samples, but the witness would not say that they had made these exact shades.

HENRY SHAW, a witness for the defendant, testified that he was a chemist formerly employed in the works of John and James White, the largest bichromate of potash manufacturers in the world,
38 at Wellington, near Glasgow, Scotland, for seven years. For the past three years he had been located in business at Philadelphia; that he was familiar with bichromate of potash, but not with bichromate of soda.

Q. Have you ever handled bichromate of soda?

A. We have never had any bichromate of soda made beyond simple laboratory experiments.

Q. Is bichromate of soda comparatively a new article in commerce in this country?

A. There had been no bichromate of soda made when I left. I

left in November, 1883, and at that date there was no bichromate of soda at all made by that firm.

On cross-examination by plaintiffs' counsel he further testified that bichromate of soda was a chemical compound and salt, and so, too, was bichromate of potash.

HAYDEN M. BAKER, a witness for the defendant, testified that he was a custom-house chemist and had been familiar with bichromate of potash and bichromate of soda about two years and a half.

Q. What is the difference or similarity between bichromate of soda and bichromate of potash?

Objected to by plaintiffs' counsel as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling plaintiffs counsel then and there excepts.

39 Ans. In the case of potassium bichromate the proportion of potassium is 26.56% and of chromium, 35.41%, and oxygen, 32.8%. In the case of soda bichromate it is 17.58% of sodium, 38.71% of chromium, and 42.08% of oxygen. This refers to the chemically pure articles. There would be some variation in the commercial articles. The bichromate of soda often contains water in considerable quantities.

Q. Go on and state all the difference or similarity and — what uses they are put.

Objected to by plaintiffs' counsel as immaterial, irrelevant, and incomptent; which objection being overruled by the court, plaintiffs' counsel then and there excepted to said ruling and to the introduction of such evidence.

Ans. In their uses they are very similar. They are applied to nearly the same purposes, with few exceptions. There are some objections, as in discharging indigo the bichromate of soda is apt to leave the figure less well defined than the bichromate of potash, but practically their properties are the same for nearly every application, like the use in galvanic batteries, or as an oxidizing agent, or for dyeing purposes, or for the manufacture of colors, organic and inorganic.

Q. For those purposes could one be used interchangeably for the other?

40 Objected to by plaintiffs' counsel as irrelevant, incompetent, and immaterial; which objection being overruled by the court, plaintiffs' counsel then and there excepted.

Ans. For some purposes; yes, sir.

Upon cross-examination by plaintiff's counsel the witness further testified:

I knew the tinctorial qualities and properties of bichromate of soda and the effects it would produce in dyeing and printing before it was introduced in this country, and when I became acquainted with it as a chemist knew that it could be applied as a tinctorial

agent, although there are some things I know about it now that I did not know then. It is a chemical compound and salt, and so, too, is bichromate of potash.

HENRY PEMBERTON, Jr., a witness for the defendant, testified that he was a manufacturing chemist, residing in Philadelphia, and had been for ten years, and was acquainted with the articles of bichromate of soda and bichromate of potash.

Q. Do you know to what uses they are applied?

Objected to by plaintiffs' counsel as immaterial, irrelevant, incompetent, and improper for the reasons hereinbefore given; which objection being overruled by the court, plaintiffs' counsel then and there excepted.

The witness then testified that they are used in the manufacturing of paints, colors—yellows and greens—in dyeing and discharging various colors, in galvanic batteries, in manufacturing alizarine and inks, and any minor purposes. I have no positive personal proof that each is used for all these purpose, but in a general way I know they are.

41

I manufacture bichromate of potash. The active and valuable ingredient in that and in bichromate of soda is chromic acid. The potash or soda are simply put there in order to enable the chromic acid to be sold in a merchantable form; it is a corrosive acid and cannot be easily shipped or manipulated; it has to be shipped in a special apparatus, while these salts are transported in ordinary casks or barrels of about 700 lbs. net weight.

The manufacturing process of the two is practicalarly identical—*i. e.*, a factory manufacturing bichromate of potash could be turned into one for the manufacture of bichromate of soda with very little, if any, modification.

Upon cross-examination by plaintiffs' counsel he further testified that he had made small lots of bichromate of soda; there was a difference in price between the two articles; that a barrel of bichromate of soda under a week's exposure to the atmosphere would absorb a few pounds of water—say from one-half of one per cent. to one per cent. of water. The best proof that chromic acid cannot be presented to commerce in any form unless combined with a base is that it has not been done; it is expensive to make pure chromic acid, and it is difficult to handle and use in the arts, to ship and pack it, and it practically requires the addition of a base to make it a useful product. The base does not enter into any purpose for which it is used and possesses no tinctorial power.

42

Both articles are chemical compounds and salts and combinations of alkali.

WILLIAM SIMON, a witness for the defence, testified that he was a practical chemist of sixteen years, residing in Baltimore, and was acquainted with bichromate of soda and bichromate of potash.

Q. Will you state their difference or similarity?

Objected to by plaintiffs' counsel as irrelevant, immaterial, and incompetent. Objection overruled by the court; to which ruling plaintiffs' counsel then and there excepts.

A. The physical properties of the two substances are in so far identical that they have the same color and are odorless and very soluble. In regard to chemical properties they are also identical as far as the main constituent, the chromic acid, is concerned. They are both salts, producing identical results, identical colors, or they act identically as oxidizing agents.

Q. To what uses are they put?

Objected to by plaintiffs' counsel as immaterial, irrelevant, and incompetent. Objection overruled; to which ruling plaintiffs' counsel duly excepts.

43 —. They are used mainly for dyeing, for producing certain pigments, and as oxidizing agents in batteries, &c., with identical results. Bichromate of soda is more soluble and absorbs when exposed to moist air water, but I have kept two barrels for eight months, weighing them every month, without finding any increase in weight.

Pure bichromate of soda contains more chromic acid than bichromate of potash, but the commercial article is made so as to contain exactly the same amount of chromic acid, and this is done to facilitate the operations of the consumer, who would not like to use an article as a substitute which contained either more or less of chromic acid. Bichromate of soda has been known and used as a commercial article since the summer or fall of 1884. A few years previous to that I tried to get a single ounce for the sake of experiments, and I could not obtain that ounce by applying to any of the dealers in this country of rare chemicals.

The witness further testified, under the exception of plaintiffs' counsel to the ruling of the court overruling an objection to the admissibility of the same as irrelevant and immaterial, that bichromate of soda was then used in 1884 as a substitute for bichromate of potash and thus advertised in commercial papers and so used in the trade.

44 Upon cross-examination by plaintiffs' counsel the witness further testified that he was the manufacturing chemist of the Baltimore Chrome Works and had the management of both bichromate of soda and bichromate of potash. They were both made from chrome ore, lime acid, &c., the materials being identical, substituting simply soda for potash, as the case might require. His company had been interested for many years at Baltimore in the manufacture of bichromate of potash and were interested to some extent in the result of this trial. Bichromate of soda and bichromate of potash are each chemical compounds and salts and also combinations of an alkali and a metal. The reason why the consumption of bichromate of soda has not increased more rapidly than it has done already is most likely due to the fact that

when it was first imported from Germany it was brought here as an impure article. The manufacturers there, trying to make an article equal in the quantity of chromic acid, had to add some impurity, as otherwise they would have given more chromic acid, so they added such salts as sulphate of sodium, sulphide of sodium, chloride of sodium, and the unsatisfactory results obtained by some of the consumers two years ago or three years ago were most likely due to this fact. The substance now left to make up for the difference between what is used for adulterating the article, I might say, is simply water—water of crystallization—which is not an objectionable article in any way, because it has to be dissolved, anyhow. So the consumption will increase as the consumer sees that the article is actually applicable to all these operations. The consumption is increasing. Any one introducing a new article has difficulties in doing so. I have made large quantities of bichromate of soda. I have not made all these chrome yellows of it. I am positive I could produce them. I will not say that I have made them. I have made a shade something like American vermilion from the soda salt. I admit that I am not familiar with the manufacture of these various chromates of lead—with the various shades. In all those cases in which I attempted to produce a certain shade I succeeded, and I infer from that I could do so as to the others.

In rebuttal the plaintiffs recalled JOHN CAWLEY, who testified that he had heard the testimony of the witness for the defence as to the manufacture of chrome yellows from bichromate of soda as a substitute for or a replacement of bichromate of potash; that he had not found it possible to make the same colors in the same way. In some cases I have not found it possible to make the same colors at all from bichromate of soda that I have from bichromate of potash.

Q. How about the very light or very dark shades?

A. Well, I think that the difficulty is with the middle shades, too. It is impossible to obtain the same degree of brightness or to control the shades in the same way that one can with bichromate of potash. You can't substitute one for the other without great difficulty. In other words, if you had been making a line of colors with bichromate of potash you couldn't substitute the bichromate of soda and make the same color.

Upon cross-examination by defendant's counsel he further testified that he had been a manufacturer of colors about eight years; that he had used a great many tons of bichromate of soda to make colors and made a great many colors; that it would make some colors and not others.

At the close of the testimony defendant's counsel moved the court to direct a verdict for the defendant on the ground that the plaintiffs had not proven facts sufficient to enable them to recover.

Plaintiffs' counsel, upon the following ground, moved the court to direct a verdict for the plaintiffs:

Because bichromate of soda is a chemical compound and salt and so known, and is not otherwise specially enumerated or provided for in the tariff act; which the court denied, and the plaintiffs then and there excepted.

And also made a separate motion to direct a verdict for the plaintiffs because bichromate of soda, being a chemical compound and salt not specially enumerated or provided for in the tariff act, is dutiable as such and cannot be dutiable as bichromate of potash, which is another chemical compound and salt and known by a different name and is a distinct composition of matter and specially named in said tariff act; which the court denied, and plaintiffs then and there excepted.

47 And also made a separate motion to direct a verdict for the plaintiffs because bichromate of soda, being enumerated in tariff Schedule A as a chemical compound and salt not specially enumerated or provided for in the tariff act of March 3, 1883, is an enumerated article, and the similitude provisions of section 2499 Revised Statutes do not affect it for duty purposes, and it cannot be regarded under them as dutiable at the same rate as bichromate of potash, another chemical compound and salt which is specially named in said act; which the court denied, and the plaintiffs' counsel then and there excepted.

The court thereupon ruled as follows, viz:

The only question in this case is whether bichromate of soda is an enumerated article. The only enumeration is that stated in the statute, a "chemical compound and salt." A chemical compound enumerates nothing, any more than the general term manufacture. A chemical salt is, speaking generally and not with scientific precision, the combination of an acid and a base. A base is the union of a metal and oxygen. It is a most general term. I cannot think that within the meaning of the statute the term "chemical compound and salt" enumerates the article of bichromate of soda. There is no question in my mind from the testimony that bichromate of soda has a similitude in the uses to which it is applied to bichromate of potash. It is not, perhaps, as valuable or bene-

48 ficial in the manufacture of chrome yellow as the bichromate of potash; but the universal testimony of both plaintiffs and defendant's witnesses is that the general uses to which the two articles are applied are substantially identical.

The point of difference is that the plaintiffs' witnesses testify that bichromate of soda cannot be used to much advantage in the production of chrome yellow and of some other shades or perhaps many other shades of colors, giving to the testimony as much latitude as it will bear; but the general purposes for which it is used, the witnesses, starting with the testimony of Professor Morton, agree, are substantially the same.

In my opinion there is no question of fact to go to the jury. There is only a question of law.

Plaintiffs' counsel thereupon asked the court to submit the evidence on the question of similitude to the jury, which being denied

by the court, the plaintiffs counsel then and there excepted to such ruling and refusal.

Plaintiffs' counsel then excepted to the rulings of the court severally in denying the several prayers of the plaintiffs to direct a verdict in their favor upon the grounds hereinbefore stated in support of said separate motions.

Plaintiffs' counsel also then and there excepted to so much
49 of the aforesaid ruling of the court as held that bichromate of soda is not an enumerated article as a chemical compound or salt.

Plaintiffs' counsel also then and there excepted to so much of the decision of the court as decides that, as a matter of law, the article of bichromate of soda bears a similitude to bichromate of potash, asking instead that that question be submitted to the jury and excepting to the refusal of the court so to submit the same.

By direction of the court the jury then rendered a verdict in favor of the defendant; to which direction plaintiffs' counsel then and there excepted.

And because the said matters of fact and law and the said several exceptions so offered and made to the opinions, instructions, and decisions of the court and to the admission of testimony during the trial do not otherwise appear by the record, therefore, on the prayer of the plaintiffs, by their counsel, the said judge has signed the foregoing as and for the bill of exceptions in this cause *nunc pro tunc* and as and for the 26th day of January, 1887, and directed the same to be filed accordingly.

(Signed) N. SHIPMAN, *Judge.*

50 [Endorsed:] 10176. U. S. circuit court, southern district of New York. E. P. Mason *et al. vs.* W. H. Robertson. Bill of exceptions. Hartley & Coleman, plaintiffs' attorneys, 62 Wall St., New York city. U. S. circuit court. Filed July 29, 1887. Timothy Griffith, clerk.

51 Supreme Court of the United States.

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|---|---|
| EARL P. MASON *et al.*, Plaintiffs in Error, *vs.* WILLIAM H. ROBERTSON, Defendant in Error. | Oct. Term, 1877. Assignment of Errors. |

Afterwards, to wit, on the third Monday of the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Hartley & Coleman, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid for the
or aforesaid and other errors in the record and proceedings afore-
id may be reversed, annulled, and altogether held for nothing,
d that they, the said plaintiffs, may be restored to all things which
ey have lost by occasion of said judgment, &c.

HARTLEY & COLEMAN,
*Attorneys for Pl'ffs in Error.*

[Endorsed:] 10176. United States Supreme Court. E. P. Mason *et al.*, plaintiffs in error, *vs.* W. H. Robertson, defend-
nt in error. Assignment of errors. Hartley & Coleman, pl'ffs' att'ys,
2 Wall St., N. Y. city. Due service of a copy *of* hereof is hereby
cknowledged this 18th day of October, 1887. Stephen A. Walker,
. S. att'y, attorney for def't in error. U. S. circuit court. Filed
ct. 18, 1887. Timothy Griffith, clerk.

3 Supreme Court of the United States.

EARL P. MASON *et al.*, Plaintiffs in Error,
*vs.*
WILLIAM H. ROBERTSON, Defendant in Error. } Oct. Term, 1887.

Afterwards, to wit, on the third Monday of the same term, before
he justices of the said court, at the Capitol, in Washington, comes
he said defendant in error, by Stephen A. Walker, the attorney of
he United States, attorney for said defendant, and says that neither
n the record nor proceedings aforesaid is there any error nor in the
rving of the judgment aforesaid, and he prays that the court now
ere may proceed to examine as well the record and proceedings
aforesaid as the matters aforesaid above assigned for error,
and that the judgment aforesaid in form aforesaid given may
be in all things affirmed, &c.

STEPHEN A. WALKER,
*Attorney for Defendant in Error.*

(Endorsed:) 10176. U. S. Supreme Court. E. P. Mason & *al.*,
l'ffs in error, *vs.* W. H. Robertson, def't in error. Joinder in error.
Due service of a copy hereof is hereby admitted this 18th day of
October, 1887. Hartley & Coleman, pl'ffs' att'ys. U. S. circuit
ourt. Filed Oct. 18th, 1887. Timothy Griffith, clerk.

5 U. S. Circuit Court, Southern District of New York.

EARL P. MASON & *al.*
*v.*
W. H. ROBERTSON. } No. 10176.

And now come the plaintiffs, by Hartley & Coleman, their att'ys,
nd show to the court that the judgment herein in favor of the de-
ndant and against the plaintiffs is for the sum of forty-six $\frac{85}{100}$
ollars, and that the plaintiffs propose to sue out a writ of error to
use the said judgment to be reviewed, and they further propose,
s the security to be taken by the court, to pay into the registry of

the court the sum of eighty dollars, conditioned upon the successful prosecution of their said writ of error to effect and that they will pay all damages and costs if they fail to reverse the judgment aforesaid, said sum of eighty dollars to be hereafter paid out
56 upon the order of the court as it may be found due.

Now, therefore, it is ordered that such payment into the registry of this court shall be good and sufficient security upon said writ of error and the citation thereunder.

E. HENRY LACOMBE, *Judge.*

Received into the registry of this court from the plaintiffs in this action eighty dollars in accordance with the foregoing order.

Dated New York, Oct. 17, 1887.

TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) No. 10176. U. S. circuit court, south. dist. of N. Y. E. P. Mason & *al. v.* W. H. Robertson. Order. Hartley & Coleman, pl'ffs' att'ys, 62 Wall St., New York city. U. S. circuit court. Filed Oct. 17, 1887. Timothy Griffith, clerk.

57 UNITED STATES OF AMERICA, *ss:*

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of October term, eighteen hundred and eighty-seven, to wit, the 24th day of October, 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Earl Philip Mason, William P. Chapin, Samuel L. Peck, Edward E. Arnold, and J. Frank Greene are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, Oct. 17th, 1887.

E. HENRY LACOMBE, *Judge.*

58 [Endorsed:] E. & A. A. 715. 10176. U. S. Supreme Court. Earl P. Mason & *al.*, plaintiffs in error, against W. H. Robertson, defendant in error. Citation. Due service of a copy of the within citation is hereby admitted this 17 day of October, 1887. Stephen A. Walker, —, attorney for defendant in error.

[Stamped:] U. S. circuit court. Filed Oct. 17, 1887. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 277. Earl Philip Mason, William P. Chapin, Samuel L. Peck, Edward E. Arnold, and J. Frank Greene, plaintiffs in error, *vs.* William H. Robertson, late collector of the port of New York. Filed October 22, 1887.

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# U. S. Supreme Court.

EARL P. MASON ET AL.,
Plaintiffs in Error,

vs.

WILLIAM H. ROBERTSON.

October Term, 1890. No. 277.

## BRIEF FOR PLAINTIFFS IN ERROR.

### Statement.

In 1885 plaintiffs in error imported at New York an invoice of bichromate of soda.

Bichromate of soda is a salt composed of chromic acid and a base, sodium.

Record, page 9, folio 24.

It is both a chemical compound and a chemical salt. In this the witnesses and the Court agreed (Record, p. 7, fol. 20; p. 9, fol. 24; p. 12, fol. 30; p. 13, fol. 32; page 15, foot; p. 16, fol. 37; p. 17, top; p. 18, top; p. 18, fol. 42; p. 19, fol. 44; p. 21, fol. 47).

The defendant Collector exacted duty, at three cents per pound, as upon a non-enumerated article resembling bichromate of potash in the use to which it

might be applied, under the similitude clause of Section 2499 Revised Statutes.

Bichromate of potash paid by name three cents per pound under Schudule A of the Tariff Act of March 3, 1883.

Said Schedule A had a further provision for "all chemical compounds and salts, *by whatever name known*, and not specially enumerated or provided for in this act, twenty-five per centum *ad valorem*."

Plaintiff in error, claiming that his import was a chemical compound and salt not named in the statute, made due protest against the Collector's exaction, and brought this suit.

All testimony as to similitude to bichromate of potash was taken under the exceptions of plaintiff in error.

Exceptions were also taken to the refusal of the Court to direct a verdict for the plaintiff on the uncontradicted evidence that the goods were a chemical compound and salt not specially enumerated and provided for; also to his charge that the goods were a non-enumerated article, and that the term chemical compound and salt was not an enumeration of bichromate of soda; also to his refusal to submit the question of similitude to the jury; also to his direction of a verdict for the defendant.

The evidence was that the two articles were not the same either in fact or commercially.

One of the plaintiffs testified that the article in suit was bichromate of soda, bought as such and sold as such.

Magee was familiar with both articles; they were not the same article commercially nor would one be furnished under an order for the other. The difference in price was $1\frac{1}{2}$ cents (per pound) (Record, p. 7, fol. 19).

Klipstein said they were different commercial articles (Record, p. 8, fol. 22).

Blode said (p. 12, fol. 30) that he was acquainted with the articles commercially known as bichromate of soda and bichromate of potash; also (p. 13, fol. 32), "If one should send me bichromate of soda when I wanted bichromate of potash, I should not accept it as filling the order. There is a difference in the commercial value."

Hunter (p. 14, fol. 34) testified there was a difference in price.

Drummond (p. 9, fol. 24) testified there is a difference in price, also in solubility, and, as ordinarily found in commerce, a difference in appearance.

Prof. Morton said (p. 7, fol. 20) bichromate of potash is not the same article as bichromate of soda. It is chemically a different substance, and it differs in physical properties, so that it is quite easy to recognize or distinguish one from the other.

There was a conflict of testimony on the question of similitude in use between the article in suit and bichromate of potash.

Drummond, the manufacturing chemist of the color house of F. W. Devoe & Co., said that he had several times used bichromate of soda in the manufacture of chrome yellows instead of using bichromate of potash, and the result was so unsatisfactory they would not sell it. Chromic acid gives a different result when combined with potash than when combined with soda in the business of color making (p. 9, fol. 24).

(P. 11, fol. 27), Plaintiffs' witness Cawley, a chemist in the Barnet Color Works, testified that he had tried to replace bichromate of potash with bichromate of soda because it was cheaper, but found it could only be used by inventing new processes; that for their old colors they had still to use bichromate of potash, and also (p. 20,

fol. 45), "If you had been making a line of colors with bichromate of potash you couldn't substitute the bichromate of soda and make the same color." He had been a manufacturer of colors eight years and had *used a great many tons of bichromate of soda* (p. 20, fol. 46).

Defendant's witnesses gave evidence tending to show a similarity of use.

Prof. Chandler said, "they may be applied to the same uses with equal results" (p. 12, fol. 29), but "he never had any practical experience in manufacturing, only in the laboratory."

Blode (p. 12, fol. 30) was sure that there was no difference in their use. He had made all varieties of chrome yellow, but *not as a regular thing.* I cannot state whether bichromate of soda would make American vermillion or not."

Hunter (p. 14, fol. 33) had used both in dyeing with equal results, but principally bichromate of potash, and preferred it, used the soda salt *only experimentally.*

Plaintiff's witnesses were practical color makers who used bichromate of soda by the ton, while defendants were in general scientific experts who were obliged on cross-examination to confess either that they had never done the things they said could be done, or, if at all, only experimentally.

For instance, defendant's witness Semper (p. 16), who said on his direct examination that the articles are applied to the same uses with equal results. On his cross-examination said that it was *possible* to make with bichromate of soda as well as with bichromate of potash the shades of chrome yellow known as orange, medium and lemon, but they had never done it; they had never made all the shades with bichromate of soda.

Pemberton (p. 18, fol. 41) testified that "they are used for many specified purposes; I have no posi-

tive personal proof that each is used for all these purposes, but in a general way I know they are." He had only made small lots. He was a maker of bichromate of potash.

Simon testified (p. 19) that they are used mainly for dyeing, etc., with *identical results*. On cross-examination he said: "I have not made all these chrome yellows of it. I am positive I could produce them. I will not say that I have made them. I have made a shade something like the American vermilion from the soda salt. I admit that I am not familiar with the manufacture of these various chromates of lead with the various shades. In all these cases in which I attempted to produce certain shades I succeeded, and I infer from that that I could also do so as to the others."

All this was negatived by the witness Cawley, who used the article by the ton (p. 20, fol. 46). "In other words, if you had been making a line of colors you couldn't substitute the bichromate of soda and make the same color."

## Errors Assigned.

The Court erred as follows:

### I.

In deciding, as matter of law, that bichromate of soda is not an enumerated article as a chemical compound or salt (Record, fol. 49), the words of the charge being, "The only question in the case is whether bichromate "of soda is an enumerated article. The only enumera- "tion is that stated in the statute—a 'chemical com- "pound and salt.' A chemical salt is, speaking gener- "ally and not with scientific precision, the combina- "tion of an acid and a base. * * * I cannot think "that within the meaning of the statute the term chem-

" ical compound and salt enumerates the article bichro-
" mate of soda."

Record, folio 47.

## II.

In refusing to direct a verdict for the plaintiff at the close of the testimony, because bichromate of soda is a chemical compound and salt and so known, and is not otherwise specially enumerated or provided for in the Tariff Act.

Record, folio 46.

In refusing to direct a verdict for the plaintiff at the close of the testimony, because bichromate of soda being a chemical compound and salt not specially enumerated, it is dutiable as such and cannot be dutiable as bichromate of potash, which is another chemical compound and salt and known by a different name, and is a distinct composition of matter and specially named in said Tariff Act.

Record, folio 46.

In refusing to direct a verdict for plaintiffs at the close of the testimony because bichromate of soda being enumerated in tariff Schedule A, as a chemical compound and salt not specially enumerated or provided for in the Tariff Act of March 3, 1883, is an enumerated article, and the similitude provisions of Section 2499, Revised Statutes, do not affect it for duty purposes, and it cannot be regarded under them as dutiable at the same rate as bichromate of potash, another chemical compound, and salt which is specially named in said act (Record, fol. 47).

## III.

In admitting evidence of the uses to which bichromate of soda and bichromate of potash were put com-

mercially—for the purpose of invoking the similitude law—the same being immaterial, as bichromate of soda was enumerated and provided for in the tariff as a chemical compound and salt not specially enumerated or provided for (fol. 21, question to Prof. Morton; fols. 22 and 23, questions to witness Klipstein; fol. 27, question to witness Cawley; fol. 28, question to Prof. Chandler; fols. 30, 31, questions to witness Bloede; fol. 33, question to witness Hunter; fol. 36, question to witness Semper; fols. 39 and 40, questions to witness Baker; fol. 39, question to witness Pemberton; fol. 41, question to witness Simon, fol. 42).

## IV.

In deciding as matter of law that the article bichromate of soda bears a similitude to bichromate of potash, and in refusing to submit the question of similitude to the jury (Record, fol. 49). The words of the charge referred to being: "There is no question in my mind from the testimony that bichromate of soda has a similitude in the uses to which it is applied to bichromate of potash." * * * "In my opinion there is no question of fact to go to the jury. There is only a question of law" (Record, fols. 47, 48).

## V.

In refusing (after deciding bichromate of soda to be non-enumerated) to submit the evidence on the question of similitude to the jury.

## VI.

In directing a verdict for the defendant. By direction of the Court, the jury then rendered a verdict in favor

of the defendant, to which direction plaintiff's counsel then and there excepted (p. 22, fol. 49).

## Statutes to be Considered.

Act of March 3, 1883, Section 2502, 22d Stats., 491, near bottom.

SECTION 2502. "There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are by the schedules respectively prescribed, namely:

SCHEDULE A. CHEMICAL PRODUCTS.

* * * Bichromate of potash, three cents per pound. * * * (22d Stats., p. 493, near top). Various other salts are provided for by name in this schedule, and there is the further provision plainly residuary. * * * All preparations known as essential oils, expressed oils, distilled oils, rendered oils, *alkalis, alkaloids and all combinations of any of the foregoing, and all chemical compounds and salts by whatever name known, and not specially enumerated or provided for in this act*, twenty-five per centum *ad valorem* (22d Statutes, page 494, near top).

SECTION 2513. There shall be levied, collected and paid on the importation of all raw or unmanufactured articles not herein enumerated or provided for, a duty of ten per centum *ad valorem;* and all articles manufactured in whole, or part, not herein enumerated or provided for, a duty of twenty per centum *ad valorem* (22d Statutes, p. 523, middle).

SECTION 2499. There shall be levied, collected and paid on each and every *non-enumerated article* which

bears a similitude either in material, quality, texture, or the use to which it may be applied to any *article enumerated in this title as chargeable* with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned. * * * (22 Stats., p. 491).

## Synopsis of Argument.

**I.** The language of the statute enumerating bichromate of soda as a chemical compound and salt, by whatever name known, and not specially enumerated or provided for in this act, is plain and must be absolutely obeyed.

**II.** Bichromate of soda is an enumerated article, and therefore not to be classed by similitude:

*(a)* Upon the authority of decided cases.

*(b)* Upon the contemporaneous construction and application of the statute.

*(c)* Upon the reason and spirit of the statutory scheme for the levying of duties.

It is immaterial if *one enumerated article* bears a similitude to *another enumerated article*, because an article must be *non-enumerated* before any question of similitude can arise. Similitude cannot cause an article to become non-enumerated.

## I.

To impose on "bichromate of soda," which is a "chemical salt, by whatever name known, and NOT specially enumerated or provided for," the different duty imposed on "bichromate of *potash*," which is a chemical

salt SPECIALLY enumerated or provided for, is to do precisely what Congress said should not be done.

In the construction of this "as in that of every other statute, one cardinal rule must govern, and it is this: that wherever the will or intention of the law-making power is declared in plain and unequivocal terms, that will or intention must be followed—absolutely followed.

Binns vs. Lawrence, 12 Howard, 17 and 18.
Maillard vs. Lawrence, 16 How., 261, near top.
Merritt vs. Welch, 104 U. S., 701, 702.

There is peculiar force in the words of the law "by whatever *name* known," for in their application they authorize us to write into the statute the particular *name* by which any chemical compound and salt, not specially enumerated in the act, is known. Thus it reads here, in effect, "all chemical compounds and salts (amongst others bichromate of soda) not specially enumerated or provided for in this act," and is equivalent to laying a duty on bichromate of soda by name.

## II.

*(a)* Bichromate of soda is an enumerated article, enumerated under the designation of "a chemical compound and salt, by whatever name known, and not specially enumerated or provided for."

The Court below charged that "a chemical compound " enumerated *nothing*, any more *than the general term* " *manufacture*." * * * I cannot think that, within " the meaning of the statute, the term chemical com- " pound and salt enumerates the article 'bichromate of " soda.'"

Unfortunately for the illustration, this general term

" manufacture," had been even then repeatedly decided to be an enumeration.

Arthur vs. Sussfeld, 96 U. S., 128.
Smythe vs. Fiske, 23 Wall., 381.
U. S. vs. U. S. Telegraph Co., 2 Benedict, 362, 365.

And by necessary implication in Stuart vs. Maxwell, 16 How., 158, where " manufactures of cotton not other- " wise provided for " was the enumerated article to which the non-enumerated article in that case was assimilated. In Arthur vs. Fox, 108 U. S., p. 128, the Court say: " The goods are non-enumerated, but they " are substantially like a manufacture of goat's hair and " cotton which is enumerated " (as stated in Herman vs. Arthur, 127 U. S., 369, where the case is cited as explained).

But since the case at bar and those following it were tried, what an enumerated article is under the tariff has been definitely decided by this Court and is finally settled in Arthur vs. Butterfield, 125 U. S., pp. 70–76. " To place articles among those designated as " enumerated it is not necessary that they should be " specifically mentioned. It is sufficient that they are " designated in any way to distinguish them from other " articles. Thus, the words ' manufactures, of which steel " ' is a component part,' and ' manufactures, of which " glass is a component part,' have been held a sufficient " designation to render the goods enumerated articles " under the statute and take them out of the similitude " clause (Arthur vs. Sussfeld, 96 U. S., 128). Upon " the same principle ' manufactures of hair ' must be " held a sufficient designation to place such manufac- " tures among the enumerated articles."

In Hartranft vs. Myer, 135 U. S., 239, this case is cited and sustained.

Aloe vs. Churchill, 44 Federal Reporter, 50, is the

latest case below, and cites many of the earlier authorities.

Therefore, we say that the term "chemical salt" does designate each and every chemical salt "in a way to "distinguish them from other articles," which is decisive of this controversy.

The term "chemical salt" describes a definite composition of matter. It is a clear cut and sharply defined term, distinct from acids, alkalis and other chemical compositions, which are all aptly placed with it in a schedule entitled *Chemical Products.*

That the terms are too general is a legislative not a judicial question.

The purpose of Congress was to provide in one schedule for all dutiable chemical products. To name each specially was impossible. New ones are discovered daily. How could an act be framed *for future use* without the aid of general terms. To refuse to apply them is to refuse to carry out the expressed intention of the law makers.

We have only to consider, Can they be applied?

*(b)* The Treasury Department, from the first to the last, has freely applied them, and the following, among other instances, are cited:

SCHEDULE OF TREASURY DECISIONS CLASSIFYING ARTICLES AS CHEMICAL COMPOUNDS OR SALTS.

Oct. 13, 1883, S. No. 5949. "Effervescent citrate of magnesia."

Nov. 12, 1883, S. No. 6006. "Citrated kali."

April 8, 1884, S. No. 6291. "Citrate of magnesia."

April 15, 1884, S. No. 6301. "Chloride of barium."

Feby. 9, 1885, S. No. 6758. Chemical compounds not to be assimilated.

Jan. 3, 1887, S. No. 7952. "Golden sulphuret of antimony or pentasulphide of antimony."

March 4, 1887, S. No. 8092. "Chloride of magnesium."

March 26, 1887, S. No. 8138. "Magnesium chloride."

Dec. 23, 1887, S. No. 8593. "Subacetate of copper."

March 3, 1888, S. No. 8707. "Moor salt, an impure sulphate of iron, containing some sand and iron rust."

May 8, 1888, S. No. 8821. "Saccharine."

May 14, 1888, S. No. 8835. "Lighting Fluid, a solution of oxide of zincorium, canthanium and ythrium in nitric acid."

Sept. 11, 1888, S. No. 9019. "Hydroquinone."

Nov. 11, 1888, S. No. 9097. "Salol."

Jan. 22, 1889, S. No. 9207. "Soda lime," a union of caustic lime and caustic soda.

March 5, 1889, S. No. 9276. "Phenacetin, creosote, sulfonal, hydrochinon."

April 15, 1889, S. No. 9336.

Oils of savin, sage and sandal-wood classed as essential oils, and articles similar to salol as chemical compounds and salts.

May 29, 1889, S. No. 9408. Creolen and ichltryol.

September 25, 1889, S. No. 9630. Napthionate of soda, combination of napthionic acid and soda.

November 18, 1889, S. No. 9715. Carlsbad Sprudel salts.

March 8, 1890, S. No. 9910. Eikonogen.

May 1, 1890, S. No. 10006. Chloride of Lime.

July 14, 1890, S. No. 10110. Binitrotoluole.

August 11, 1890, S. No. 10143. Napthol Salt.

September 15, 1890, S. No. 10,249. Dimethye Aniline.

September 15, 1890, S. No. 10,250. Napthionate of Soda.

This contemporaneous construction of the act during

its whole lifetime—from 1883 to 1890—is entitled to some weight in favor of the importers.

Robertson vs. Bradbury, 132 U. S., 493; citing with approval U. S. vs. Johnson, 124 U. S., 236, 253.
Robertson vs. Downing, 127 U. S., 607, 613.

This Court has in Robertson vs. Rosenthal, 132 U. S., 463, made a Treasury decision the basis of a ruling against the importer.

*(c.)* The revenue system and the language of the statutes necessarily requires the interpretation we contend for.

"To enumerate" is to mention, and the duty in Section 2502, R. S., is levied upon "all *articles* imported * * * mentioned in the schedules herein contained," among which are "chemical compounds and salts" in Schedule A.

As Section 2513, R. S., provides for all "articles not enumerated or provided for herein" (in the act), this should be conclusive.

The text of the similitude law, Section 2499, R. S. *(supra)*, distinctly states that an "enumerated article" is an "article enumerated in this title as chargeable with duty."

"Enumerated" in tariff parlance means specified in the schedules. This may be by name, as a glove; by use, as wearing apparel; commercially, as hosiery; by component material, as a manufacture of silk; chemically, as an acid, an alkali or a salt.

When compared, one term in the schedules may be more specific than another, and almost every schedule has one or more residuary clauses, but all articles described by these are "articles enumerated in this title as chargeable with duty," and are not the non-enumerated articles referred to in the similitude law which are to be found in Section 2513.

The tariff of 1883 speaks of articles as "not specially

*otherwise* enumerated," "not otherwise enumerated," and "not specially enumerated," more than one hundred times.

In Schedule A alone the term "not specially enumerated or provided for in this act" is applied to classes of merchandise eighteen times, among which is the clause for chemical compounds and salts. This language is used to avoid conflict with *other* enumerating clauses and to form residuary clauses from which no unnamed articles of the class were intended to escape. Hence, in the clause in dispute, the use of the words "chemical compounds and salts by *whatever name known*."

See remarks on enumeration in U. S. vs. Washington Mills, 2 Clifford, 601–5.

To apply the rule of similitude frustrates the purpose of the law.

No one can reasonably suppose that the one hundred and fifteen specifications in the schedules and free list ending with the words "not specially enumerated, &c.," or "not otherwise enumerated," or "not otherwise specially enumerated, &c.," are parts of the "non-enumerated articles" described in Section 2513 R. S., nor that these one hundred and fifteen specifications can be classed for duty under the similitude rule. They are themselves clauses enumerating articles for duty.

It is clear that the similitude rule operates only on the general non-enumerated section (2513) and not on the prior provisions of the tariff making articles dutiable or free, a proposition supported directly or by necessary implication by all the cases but the four (practically two) in the Circuit Court, which we shall presently consider.

Morlot vs. Lawrence, 1 Blatch., 608, 610, 611.
Lottimer vs. Same, *Ibid.*, 614.
Ross vs. Peaslee, 2 Curtis, C. C., 500 to 502.
Arthur vs. Unkart, 96 U. S., 121.
Herman vs. Robertson, 33 Fed. Rep., 654.

The cases below in opposition to the decisions just cited are :

Cohen vs. Phelps, 19 I. R. Rec., 67 ; s. c., 2d Sawyer.
Biddle vs. Hartrauft, 29 F. R., 90.
Mason vs. Robertson, 29 F. R., 684.
Lloyd vs. McWilliams, 31 F. R., 261.

And all are infected with the same error.

Cohen vs. Phelps states it clearly.

It refers to the United States vs. The United States Telegraph Co., from which it dissents, and says : "Any article *not mentioned by its specific name* in the Act of 1846 or subsequent acts which can be classed under the name of any other article specifically mentioned in the act, construed by Section 20 of the Act of 1842, is a non-enumerated article within the meaning of that section, and must be classed under the latter name."

This decision was rendered February 3, 1874, and was practically overruled by this Court in Arthur vs. Sussfeld, 96 U. S., 128, decided in 1877.

The other three cases, which include that now at bar, all arose under the clause of the Statute of 1883, chemical compounds and salts. Biddle vs. Hartrauft was the initial case, and the others followed as a matter of judicial comity. The error is now under examination in this case, and one cannot be used to sustain the other.

### The Mischief of Defendant's Construction.

To admit that articles mentioned in the schedules otherwise than by specific name are non-enumerated, and therefore subject to classification by the similitude rule, is very dangerous and mischievous, because it substitutes the shifting opinions of Courts and juries for the express declarations of Congress in respect to the greater number of articles imported but few of which are mentioned in the tariff *nominatim*.

Interference with rates of duty where Congress has specifically spoken, as in the schedules, raises doubts where none were before, disintegrates the tariff, and makes rates of duty purely speculative, as well for the officer who collects as for the citizen who pays.

What would be left of the tariff if its express designations were turned over to the similitude rules for rates of duty?

How could merchants safely import goods (and duty laws are made to regulate their business and to be understood by them) if, under the similitude law, you can class them, on arrival, at different rates from those expressly provided by Congress?

When we consider that, under the Governments' interpretation, here carried to its logical consequence, every residuary clause in the tariff becomes meaningless; that every descriptive term and every class of articles more general than the *specific* name becomes split up into non-enumerated articles, we can begin to see the ruin it will work.

If you can take out one enumerated article, you can take all.

If we are to have these specifications, which comprise more than two-thirds of the dutiable provisions, set aside for similitudes to be found by juries, the ruin of our merchants will be complete.

## Other Errors.

The Court erred in holding as matter of law that there was a similitude and in refusing to submit that issue to the jury.

The question of similitude is like that of negligence —a conclusion of fact—to be drawn from the testimony —and only by the jury. If different minds can draw therefrom different conclusions, it is for the jury.

R. R. Co. vs. Stout, 17 Wall., 664, 665.

Much of the testimony on behalf of the defendant was that of experts—Prof. Chandler, for instance, and others.

The rule is that it is for the jury to decide whether any, and, if any, what, weight is to be given to such testimony.

Spring Co. vs. Edgar, 99 U. S., 658.

Testimony was given by practical color makers using tons of bichromate of soda not only that it would not replace bichromate of potash in making chrome yellows but generally that the *whole line* of colors made with bichromate of potash could not be made by the use of bichromate of soda.

This was contradicted by defendant's experts. The jury was entitled to pass upon the credibility of the witnesses; who was the best informed, how far their interests as manufacturers or dealers tended to bias their statements, the difference between men of theory and practical men, between careful and reckless witnesses.

All these considerations lead up to the conclusion adopted by this Court in Hermann vs. Arthur's Exrs., 127 U. S., p. 363.

"We are of opinion that the question of similitude "was one of fact that should have been submitted to "the jury under proper instructions. As there was "error in the particular mentioned, we do not deem it "proper to consider any of the other questions raised "and discussed by counsel."

See also Barney vs. Schmeider, 9 Wall., 248.

An examination of the record shows, we respectfully submit, that the evidence was not fairly characterized by the statement that "the universal testimony of both plaintiffs' and defendant's witnesses is that the general uses to which the articles are applied are substantially identical."

There was no waiver of jury trial, but the contrary—as in

Baylis vs. Travelers Insurance Co., 113 U. S., 321,

where the Court says:

" The plaintiff in error complains that he was entitled " to have the evidence submitted to the jury and to the " benefit of such conclusions of fact as it might justifi- " ably have drawn a right he demanded and did not " waive; and that he has been deprived of it by the act " of the Court in entering a judgment against him on " its own view of the evidence without the intervention " of a jury.

" In this particular we think error has been well " assigned."

The Court erred in directing a verdict for the defendant for the reasons hereinbefore stated, and the judgment should be reversed.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Counsel for Plaintiffs in Error.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1890.

EARL PHILIP MASON ET AL.
*vs.*
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No. 277.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

**BRIEF FOR DEFENDANT IN ERROR.**

# In the Supreme Court of the United States.

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*vs.*
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*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT.

This suit was commenced in December, 1885, in the circuit court, southern district of New York, by the members of the firm of Mason, Chapin & Co., against William H. Robertson, collector, to recover $364.27 alleged illegal excess of duty exacted and paid upon an importation of bichromate of soda imported by the plaintiffs and brought from Antwerp by the steamer *Westernland*,

and entered for consumption at the port of New York March 3, 1885.

The commodity in question consisted of 30 casks of bichromate of soda, weighing 17,227 pounds, and valued at 3,325.85 marks.

Trial was had before Judge Shipman and a jury in January, 1887.

THE TARIFF PROVISIONS.

By the tariff act of March 3, 1883 (22 Stat., 488), section 2499 of the Revised Statutes is amended (p. 491) so as to read as follows:

> SEC. 2499. There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable, etc.

By Schedule A of said act a duty is laid upon bichromate of potash in the following words (22 Stat., 493):

> Bichromate of potash, three cents per pound.

Said Schedule A also contains the following provision (p. 494):

> All preparations known as essential oils, expressed oils, distilled oils, rendered oils, alkalis, alkaloids, and all combinations of any of the foregoing, and all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem.

The collector exacted and received a duty of 3 cents per pound upon the bichromate of soda imported, as a non-enumerated article bearing a similitude to bichromate of potash, while the importers protested that the article was not dutiable at that rate or under those provisions, and insisted that the same was dutiable at 25 per cent. ad valorem as a chemical compound and salt, under the paragraph last quoted.

The first question presented by this case is, whether in March, 1885, bichromate of soda was dutiable at the rate of 3 cents per pound or whether it was only subject to duty of 25 per cent. ad valorem; and the second is the incidental question of directing a verdict in defendant's favor.

In order to present a complete view of this branch of the subject, it is deemed permissible to state, that in the tariff act of 1890 (Stat., 567), paragraphs 69 and 82 (pp. 569, 570) read respectively as follows:

> *Potash.* 69. Bichromate and chromate of, three cents per pound.
>
> *Soda.* 82. Bichromate and chromate of, three cents per pound.

While the "chemical compounds and salts" clause (p. 570) is as follows:

> 76. Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem.

And the similitude clause appears in section 5 of said act (p. 613) as follows:

> SEC. 5. That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable there shall be levied on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty, etc.

*Bichromate of soda was commercially unknown when the tariff provisions were enacted.*

It is manifest that the material, bichromate of soda, was not contemplated specifically in the enactment of March 3, 1883. Although this substance had been known for a period of perhaps 50 years, it is evident from the testimony taken in this case that it was not commercially

known as an article of importation until after the year 1883. The witness, Professor Morton, says (folio 21):

> The use of bichromic acid commercially is comparatively recent as compared with bichromate of potash, I believe, although the substance was known very long ago.

Witness Drummond says (folio 26) that—

> Bicromate of soda as a tinctorial agent had been brought to his notice within 4 or 5 years;

although it had been known in chemistry for a very long time. The witness Bloede says (folio 30)—

> The first commercial sample of bichromate of soda I believe I saw was in 1884. Prior to that time I think it had not been known or used commercially in this country.

Witness Semper says of it (folio 37)—

> I have heard of it about 3 years ago for the first time—3 or 4 years ago; I do not remember the exact time. That was the first I knew of it commercially.

The witness, Shaw, states that he was a chemist formerly employed in Scotland in the works of the largest manufacturers in the world of bichromate of potash, for 7 years and that—

> There had been no bichromate of soda made when I left. I left in November, 1883, and at that date there was no bichromate of soda at all made by that firm.

The witness Simon says (folio 43)—

> Bichromate of soda has been known and used as a commercial article since the summer and fall of 1884.

A few years previous to that I tried to get a single ounce for the sake of experiments, and I could not obtain that ounce by applying to any of the dealers in this country of rare chemicals.

## ARGUMENT.

It is respectfully submitted that there are two serious errors at the foundation of the argument presented by the learned counsel for the plaintiffs in error.

Upon these two errors nearly all of their argument rests.

The first is that the provision quoted as to chemical compounds and salts is to be construed as an enumeration of bichromate of soda.

The second is in omitting to allow proper force and effect to the words "and not specially [enumerated or] provided for in this act" in the "compounds and salts" clause, and the correlative phrase "not herein [enumerated or] provided for" in section 2513.

### I.

The paragraph placing a 25 per cent. duty on "all chemical compounds and salts, by whatever name known," applies only to such compounds and salts as are "not specially enumerated or provided for in this act."

This clause can not apply to bichromate of potash, as that is specially enumerated.

It can not apply to bichromote of soda, because this article is "provided for in this act," to wit, in the similitude clause of section 2499, reënacted as a part of this act.

If the thing charged with a duty is "enumerated" in

this act, or if it is otherwise "provided for in this act," it is not within the limitations of the "chemical compounds and salts" clause.

Bichromate of soda, by the similitude it bears to bichromate of potash, is manifestly covered by said section 2499, and is not, therefore, a floating commodity of commerce, to be brought in to pay its customs duty under the "compounds and salts" clause.

When it is made apparent that the thing imported "bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated," it is "provided for in this act," and is outside of the scope of the "compounds and salts" clause.

Here is an article known to chemistry, but unknown to commerce at the time the tariff act is passed.

Afterwards it becomes an article of commerce, and when imported, the question arises as to what duty it shall pay under the law.

Being commercially unknown when the law was enacted it was not enumerated; for the same reason there could be no intent to classify it as a "chemical compound, or salt." What rate of duty shall it bear? It is provided for in the similitude clause of the act; it bears a marked similitude to bichromate of potash and it is therefore dutiable at the rate of 3 cents per pound.

(*a*) The decision of the court below is as follows (Rec., p. 21; 29 Fed. Rep., 684):

> The only question in this case is whether bichromate of soda is an enumerated article. The only enumeration is that stated in the statute, "a chemical

compound and salt." A chemical compound enumerates nothing any more than the general term manufacture. A chemical salt is, speaking generally and not with scientific precision, the combination of an acid and a base. A base is the union of a metal and oxygen. It is a most general term. I can not think that within the meaning of the statute the term "chemical compound and salt" enumerates the article of bichromate of soda. There is no question in my mind from the testimony that bichromate of soda has a similitude in the uses to which it is applied to bichromate of potash. It is not, perhaps, as valuable or beneficial in the manufacture of chrome yellow as the bichromate of potash; but the universal testimony of both plaintiffs and defendant's witnesses is that the general uses to which the two articles are applied are substantially identical.

The point of difference is that the plaintiffs' witnesses testify that bichromate of soda can not be used to much advantage in the production of chrome yellow and of some other shades or perhaps many other shades of colors, giving to the testimony as much latitude as it will bear; but the general purposes for which it is used, the witnesses, starting with the testimony of Professor Morton, agree, are substantially the same.

In my opinion there is no question of fact to go to the jury. There is only a question of law.

The learned counsel for the plaintiffs in error say in their brief (p. 10):

"Unfortunately for the illustration, this general term 'manufacture' had been even then repeatedly decided to be an enumeration," citing *Arthur* v. *Sussfeld* (96 U. S., 128); *Smythe* v. *Fiske* (23 Wall., 381); *United States* v.

*Telegraph* (2 Benedict, 362). Neither of these cases justifies the criticism.

The court below uses the single term "manufacture." In the first case cited, the spectacles were rated under the tariff clause, "On pebbles for spectacles and all manufactures of glass, or of which glass shall be a component part."

In the second case it was held that the silk ties imported were dutiable under the clause, "On all manufactures of silk or of which silk is the component material of chief value," etc.

In the third case the telegraphic cable imported was held to be dutiable "as a manufacture, not otherwise provided for, of which iron is the component material of chief value."

To say that these phrases are as vague and general as the term "manufacture" is a careless use of language.

(*b*) The plaintiffs in error claim in point II of their argument that "bichromate of soda is an enumerated article, enumerated under the designation of 'a chemical salt;'" and add, on page 12 of brief, "the term 'chemical salt' describes a definite composition of matter," and say, "It is a clear cut, sharply defined term."

Professor Chandler (Rec., p. 12) gives as examples of chemical salts, "common salt, ordinary fats, XXX oil of wintergreen," etc. It is submitted that a classification that includes these dissimilar substances and the two dozen others named on pages 12 and 13 of plaintiffs' brief is not an enumeration of an article under any permissible use of language. That the Treasury decisions

classify numerous articles as chemical compounds or salts, proves nothing, as no one of these articles listed in the brief is shown to have borne a similitude to any enumerated article.

Contemporaneous construction as to the quoted items presents no argument applicable to bichromate of soda. Classification is not enumeration.

That the articles listed fell under a classification is no ground for holding that the bichromate of soda is "enumerated" by the use of the words "chemical salt."

Under the construction claimed in behalf of plaintiffs in error the similitude clause would have no application in any case where the article in question could have been placed under any named classification of the tariff law, and *Arthur* v. *Fox* decides against such a construction.

(c) It is true that in *Arthur* v. *Butterfield* (125 U. S., 76) the court say that "to place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient if they are designated in any way to distinguish them from other articles."

And the phrases "Manufactures of which steel is a component part," and "Manufactures of which glass is a component part," and "Manufactures of hair," are cited as sufficient designations to render the goods enumerated.

But to say that the phrase "All chemical compounds and salts" is an equally sufficient designation to distinguish the articles falling within that class, or is any statutory designation whatever of an article that bears a similitude to an enumerated article, is not authorized by any reported decision.

In *Hartranft* v. *Meyer* (135 U. S., 237), it is held that "Woolen cloths, woolen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act," and "all goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value" are enumerated goods.

In these cases, as in the three cases specified in *Arthur* v. *Butterfield*, the constituent material is named; the substance that gives the commodity its character and value, and practically identifies it, is designated by the statute; but in the case at bar the phrase "chemical compounds and salts," whether considered as one clause or disintegrated, designates no article, material, constituent, or thing; it is merely a classification under which to write such compounds and salts as shall be unenumerated and shall bear no similitude to any article that is enumerated.

"Chemical compound and salts" is an expression too vague, general, and uncertain to be called an enumeration.

(*d*) *Defendant's construction is in accord with the decisions.*

The action of the Treasury Department and the grounds thereof appear in the following decision (Syn., 6651), made under date of November 20, 1884:

> It is understood that the merchandise in question was assessed at the same rate of duty as is levied on bichromate of potash (49 T. I., new) under the provisions of the similitude clause of section 2499, Revised Statutes, while the appellants claim that it is dutiable at the rate of 25 per cent. ad valorem (T. I., new, 92).

Bichromate of soda and bichromate of potash have the same general appearance, the same chemical construction, and are used for the same purposes. Neither is commercially valuable for any purpose, save as a base for chromic acid, which can not be practically utilized except in combination with some alkaline base. Potash was the base in general use until the passage of the act of March 3, 1883, after which soda was substituted, with the evident purpose of taking advantage of the incidental change of name, to secure a reduction in duty.

The similarity of the two salts in "material," "quality," and "uses to which they are applied" is undisputed, and, in accordance with the principle enunciated in Department's decision of March 25, 1884 (6268), bichromate of soda is held to be dutiable at the rate imposed on bichromate of potash.

Your decision is hereby affirmed.

Very respectfully,

H. F. FRENCH,
*Assistant Secretary.*

COLLECTOR OF CUSTOMS,
*Boston, Mass.*

In *Ross* v. *Peaslee* the question arose upon placing an article new to commerce called "Brown Tartar." Plaintiff claimed that it was subject to a duty of 5 per cent. as argols or crude tartar. Defendant claimed that it resembled cream of tartar and was subject to a duty of 20 per cent. By section 3, articles not specially provided for were also dutiable at 20 per cent.

The court (Curtis, J.) says:

> The twentieth section does not impose any particular rate of duty on any article. It merely gives rules of construction, by the aid of which we can determine

> under what schedule, if any, of the act of 1846 particular articles fall. And if, by the aid of these rules of construction, any particular article comes under one of those schedules, then it is provided for by the act of 1846, and, of course, does not fall within the third section as a nonenumerated article. If this import now in question is neither argols nor cream of tartar, then, though it is not enumerated by any name, yet it may bear such a similitude to one or the other of them as to fall within the rules prescribed by the twentieth section, and thus become liable to pay the rate of duty imposed upon that article which it most nearly resembles.

In *Cohen* v. *Phelps* (2 Sawyer, 530) the court (Sawyer, J.) refers to the similitude section 20, of the act of 1842, and says (p. 533):

> In other words, section 20 is to be regarded as furnishing a definition of terms, or rather a rule for construction designed to cover unknown or unlooked for articles, by which they are classed with those specifically and individually named to which they bear the greatest similitude.
>
> * * * * *
>
> It affords a rule of construction for terms applied to specific articles and substantially says that a nonenumerated article, that is to say, an article not designated by its specific name, shall be classed under the name of that article specifically named to which it bears most resemblance in material, quality, texture, or the use to which it is applied.

In *Biddle* v. *Hartranft* (29 Fed. Rep., 90) the jury found, in a special verdict, that bichromate of soda bears a similitude, in the use to which it may be applied, to bichromate of potash.

The report shows that *Arthur* v. *Fox* and *Stuart* v. *Maxwell* were cited upon the argument. McKennan, *J.*, says:

> The only question to be decided in this case is, does the similitude clause of the act contain a provision imposing a tax upon bichromate of soda? In the opinion of the court, the decision of the Supreme Court in the cases cited in the argument settles this question beyond controversy, and renders it liable to the same duty which is imposed upon the article that it resembles, thus constituting a provision in law for its taxation.

Butler, *J.*, says:

> First, bichromate of potash is provided for at 3 cents per pound.
>
> Therefore it appears that bichromate of soda, although not enumerated, is specifically provided for when provision is made in the act of Congress for bichromate of potash, and when it is ascertained that bichromate of soda is in the similitude of bichromate of potash.

In *Lloyd* v. *McWilliams* (31 Fed. Rep., 261) Colt, *J.*, says (p. 265):

> It thus appears that, in the cases where the chemical compound clause has come before the courts for construction, it has been held not to constitute such an enumeration as to take an article out from the operation of the similitude clause; that the term "chemical compound of salt," is so general that it is scarcely less an enumeration than section 2513, which assesses a certain duty on "all articles manufactured, in whole or in part, not herein enumerated or provided for."
>
> I think, upon consideration, though I was by no means free from doubt at the hearing, that the view

adopted by the courts in *Biddle* v. *Hartranft* and *Mason* v. *Robertson*, is correct. It seems to me, to hold otherwise would open the doors to the evasions of the law commented upon in *Stuart* v. *Maxwell* and *Arthur* v. *Fox*.

Nor do I think this conclusion in conflict with *Arthur* v. *Susfeld*, or *Smythe* v. *Fiske* The terms "all manufactures ot glass or of which glass shall be a component material," or "all manufactures of steel or of which steel shall be a component part," or "manufactures of silk or of which silk is the component of chief value," may be held to be an enumeration of articles by special description, because they cover only those articles made in whole or in part of a specific thing, and therefore there is little room for evasion of the revenue; whereas, the term "chemical compound" is so broad and general in its character that, if construed to be an enumeration and so shut out the similitude clause, it might result in much abuse.

The case of *Arthur* v. *Fox* (108 U. S. R., 125) is substantially in point in principle, and must be held to declare the law as applicable to the case at bar.

The court holds that the non-enumerated article, composed of cow hair and cotton, is chargeable with the same duty as the enumerated article of goat's hair and cotton.

And decides that if an article is found not enumerated in the tariff laws, *then the first inquiry is whether it bears a similitude*, etc.

The court approve the construction and reasoning declared in *Stuart* v. *Maxwell*, and say (pp. 127, 129):

Section 2499 of the Revised Statutes is a reënactment of section 20 of the act of August 30, 1842 (c.

270, 5 Stat., 565), as to which this court said in *Stuart* v. *Maxwell* (16 How., 150), speaking through Mr. Justice Curtis :

"It was designed to afford rules to guide those employed in the collection of revenue in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great, and diversities may be expected to be made in fabrics adapted to the same rules and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress, by legislation, to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted."

And again, p. 162 :

"By providing for the principal thing it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designed to serve the uses and take the place of some article described, but some trifling or colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before or knows it under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 (Rev. Stat., sec. 2499), then, declares that it is to be deemed the same, and to be charged accordingly; that the act of 1846 (the tariff act then in force) has provided for it under the name it resembles."

These observations may well be applied to the present case. The goods in question are "nonenumer-

ated;" but they are substantially like a manufacture of goats' hair and cotton, which is enumerated. They are put to the same uses, look the same, and frequently, in commerce, are called by the same name. They are made of cotton and cow hair, and are evidently of equal quality with the manufactures of cotton and goats' hair, because, in this case, they are charged with a duty of 50 cents per pound, thus indicating a value of 80 cents a pound or over, which calls for the highest duty per pound put on the goats' hair goods. It would seem to be difficult to find a closer resemblance between two articles of manufacture which were not identically the same.

But it is contended that if a nonenumerated "article is made of materials, any of which are mentioned in the statute, it is dutiable at the highest rate imposed on either of its constituents; if neither the article nor any of its component materials is designated in the tariff, then (and then only) it is dutiable according to its similitude in material, quality, texture, or use; and if, in these particulars, it equally resembles two or more enumerated articles, it pays the highest duty placed upon any of such like articles." Such, in our opinion, is not the effect of the statute. If an article is found not enumerated in the tariff laws, then the first inquiry is whether it "bears a similitude, either in material, quality, texture, or use to which it may be applied, to any article enumerated * * * as chargeable as with duty." If it does, and the similitude is substantial, then, in the language of the court in *Stuart* v. *Maxwell, supra*, "it is to be deemed the same, and to be charged accordingly." In other words, although not specifically enumerated, it is provided for under the name of the article it most resembles. If nothing is found to which it bears the requisite similitude, then an inquiry is to be in-

stituted as to its component materials, and a duty assessed at the highest rates chargeable on any of the materials. Any other construction would leave the law open to evasions, which, as was also said in *Stuart* v. *Maxwell*, it was the object of this statute, enacted more than forty years ago and kept continually in force since, to prevent.

None of the cases in this court governed by the statute in question sustain the position of the importer. In *Stuart* v. *Maxwell* it was not shown that the goods imported bore a similitude to any other article, and so resort was had to their component materials. The same is true of *Arthur* v. *Herman* (96 U. S., 141), where the importation was of "certain cheap goods, the warp of which was made of cotton and the filling or woof of cattle hair," and the only question was whether they were to be charged at 35 per cent. ad valorem under the act of June 30, 1864, chapter 171, or at 90 per cent. of 35 per cent. under the act of June 6, 1872, chapter 315. This depended on whether cotton was "the component part of chief value." There was no attempt to show their similitude to any other article, and both parties agreed that they were dutiable as manufactures of cotton. In *Murphy* v. *Arnson* (96 U. S., 131) the question was whether the article imported resembled essential oil in material, quality, or texture, and the decision was that it did not. Consequently resort was had to the material clause of the similitude act. In *Fisk* v. *Arthur* (103 U. S., 431) an article composed of cotton and linen, cotton being the material of chief value and largely predominating, was adjudged to be dutiable, under the similitude act, as a manufacture of cotton, notwithstanding it was composed of mixed materials, and this because "in material, quality, and texture, as well as the use to which it is to be put, it is precisely like cotton shirtings."

This case of *Arthur* v. *Fox* is referred to in *Herrman* v. *Arthur's executors* (127 U. S., 363), and note is made of an important distinction between these two cases, but the former case is not limited or modified by the latter.

From the foregoing citations it is claimed in behalf of the defendant in error that his contention here is practically supported by the holding of the Treasury Department, by decisions made in the circuit courts in five districts, and by the case of *Arthur* v. *Fox*.

## II.

### THE COURT DID NOT ERR IN DIRECTING A VERDICT IN FAVOR OF DEFENDANT.

### 1.

The complaint (Rec., p. 3) is based on the protest and the bill of particulars. The bill of particulars states the alleged excessive duty at $364.27 (p. 3).

The protest (p. 6) declares plaintiff's position as follows:

> Sir: We protest against your decision as to the rate and amount of duties to be paid on the bichromate of soda * * * because it is a chemical compound and salt not specially enumerated or provided for, dutiable at 25 per cent. as such under Schedule A.

Plaintiffs were entitled to a verdict only upon the establishment, affirmatively, of this position.

They utterly failed to establish this position.

Under the law of the case and the testimony given it can not be rightfully said that plaintiffs were entitled to a verdict for the amount claimed as above shown, nor, under the law and the facts of this case, would a verdict in plaintiffs' favor for the $364.27 have been allowed to stand.

Under these circumstances, and in accordance with familiar practice, a verdict was properly directed in favor of defendant.

2.

When chemically pure the principal elements of the substances are stated to be as follows (Rec., p. 17):

| | Per cent. |
|---|---|
| Bichromate of potash: | |
| Potassium | 25.56 |
| Chromium | 35.41 |
| Oxygen | 32.8 |
| Bichromate of soda; | |
| Sodium | 17.58 |
| Chromium | 38.71 |
| Oxygen | 42.08 |

It appears that the only useful or valuable material contained in either bichromate of soda or bichromate of potash is the chromic acid, and that neither of the bases of potash or soda are of any use or benefit except that they are employed as vehicles for the chromic acid.

It is manifest that if potash or soda were to be used for any purpose it would be needless to unite chromic acid with them. Plaintiffs' witness Drummond says (fol. 26):

> That the active and desirable ingredient in both these salts is chromic acid, the basis in one instance being potash and the other soda.

Plaintiffs' witness Cawley says (fol. 27):

> The desirable ingredient for use in both these salts is chromic acid. The potash or soda are vehicles that carry the chromic acid.

The witness Bloede says (fol. 30):

> The useful ingredient in both bichromate of soda and bichromate of potash is the chromic acid.

The witness repeats (fol. 33):

> I stated the chromic acid was the valuable ingredient in these two articles. It is necessary to have soda or potash as a vehicle for the acid in the production of colors. You may have soda, potash, ammonia, or any other vehicle. You can not practically as a business use the chromic acid unless you have a vehicle for it. Theoretically you could, practically you can not. But this vehicle is simply for the purpose of manipulation and has nothing whatever to do with the resulting color.

The witness Hunter says, in explaining the printing of cloth (fol. 35), that

> The blue is dyed first, dyed in the piece, and then the chromate or bichromate is printed on the indigo and afterwards passed through acid, which liberates the chromic acid—the useful ingredient in this case.

The witness Pemberton says (fol. 41):

> I manufacture bichromate of potash. The active and valuable ingredient in that and in bichromate of soda is chromic acid. The potash or soda are simply put there in order to enable the chromic acid to be sold in a merchantable form; it is a corrosive acid and can not be easily shipped or manipulated; it has to be shipped in a special apparatus, while these salts are transported in ordinary casks or barrels of 700 pounds net weight.

Hence it appears without contradiction that the chromic acid is the thing sought, and the only element of value in this importation; the potash and the soda are but vehicles carrying the acid. The action and effect of chromic acid liberated from one combination is, as a rule, the same as that of the acid when freed from the other combina-

tion; the similitude between the articles is established, and a similar rate of duty follows upon an application of the law, and there was no question to be submitted to the jury.

3.

The testimony plainly shows that plaintiffs' effort upon the trial was to prove that the two bichromates were not the same thing. The testimony is aimed at the differences which distinguish the combinations from each other.

This court said in *Greenleaf* v. *Goodrich* (101, U. S., 283):

> The statute does not contemplate that goods classed under the words "of similar description" shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with, delaines.

To show that these bichromates differ, that one absorbs water more freely than the other, that they crystallize differently and are not similar in color, that one may be produced more cheaply than the other, or that one is better adapted to the making of chrome yellow than the other, is no evidence that one does not bear a similitude to the other.

Admitting these differences to exist precisely as plaintiff's witnesses describe them, it yet appears by the undisputed testimony of both sides that bichromate of soda "bears a similitude" to, and "resembles," under the statute bichromate of potash. The former is similar to the latter in material, in quality, and in the use to which it may be applied, There is no dispute in the testimony as to the general similitude under the statute.

Plaintiffs' witness, Klopstein, says (fol. 23):

> Bichromate of soda is used mostly for dyeing, in producing blacks on cotton, very largely on cotton and wool, etc., and for a great many dyeing processes.

His witness, Drummond, says (fol. 24):

> I am practically acquainted with both bichromate of soda and bichromate of potash.
>
> We have bought the former and both buy and sell the latter. I have several times used bichromate of soda in my business for the manufacture of chrome yellows.

He states, however, that the results have been unsatisfactory.

This witness reads from a practical treatise on dyeing as follows:

> Soda is sometimes used instead of potash in the preparation of a salt of chrome. It answers the purpose of the dyer equally well.

Plaintiff's witness, Cawley, testifies (fol. 27):

> That he has used bichromate of soda quite largely for making colors, principally chrome yellows. We used it to replace bichromate of potash, and we found we had to devise an entirely new process in order to use it in that way.

Defendant's witness, Professor Chandler, testifies (fol. 29) as to the two substances under consideration, that—

> They are almost absolutely identical. The difference is in the base or metal, which in the one case is potassium and the other sodium. These two alkaline metals, which are mere vehicles for the other constituents of the salt, and for practical purposes it

is immaterial which of these metals is present. There is no chromic acid in either of these salts. It is a compound of the metal potassium in one case and the metal sodium in the other with a certain oxide of chromium, but there is no chromic acid present. So far as the chemical properties of the two salts are concerned, they are identical for every purpose for which the salts are employed and may be applied to the same uses and with equal results.

The witness Bloede says of these substances (fols. 30 and 31):

I consider them practically for all manufacturing purposes identical.

Question. Can they be used for the same purposes?

Answer. They can for all purposes, I think.

Question. With the same results?

Answer. With the same results. I so use them myself.

Question. What are they used for?

Answer. They are used in dyeing and printing all textile fabrics in various colors, form part of brown colors in dyeing black, purple, blue, and yellows, oranges, and also for the manufacture of pigment colors, yellows and oranges mainly. In a general way I am acquainted with the manufacture of the two articles. I think the processes of their manufacture are practically the same.

Folio 32 the witness continues—

There is a difference in the commercial value. There is no difference in the uses to which they are to be applied or in the way they are to be used; none whatever.

The witness Hunter states (fol. 33)—

> That these salts were principally used by him to discharge indigo; also as a mordant for blacks and other shades or colors in calico printing; also for aniline blacks after they were printed, and for other purposes; that both articles were used by him for the same purpose with equal result.

The witness Semper says of these substances (fol. 36):

> They have been applied to the same uses with equal results.

He also says (fol. 37):

> That he made chrome yellow with both these salts and produced samples—one made with the soda salt and the other made with the potash salt—and he could not tell which was so made unless he had the other one beside it.

The witness Baker states (fol. 39):

> In their uses they are very similar. They are applied to nearly the same purposes with few exceptions. There are some objections, as in discharging indigo the bichromate of soda is apt to leave the figure less well defined than the bichromate of potash, but practically their properties are the same for nearly every application, like the use in galvanic batteries, or as an oxidizing agent, or for dyeing purposes, or for the manufacture of colors, organic and inorganic.

The witness Pemberton says of these substances (fols. 40 and 41):

> That they are used in the manufacturing of paints, colors, yellows, and greens, in dyeing and discharging various colors, in galvanic batteries, and any minor purposes. I have no positive personal proof that

> each is used for all these purposes, but in a general way I know they are. * * * The manufacturing process of the two is practically identical, *i. e.*, a factory manufacturing bichromate of potash could be turned into one for the manufacture of bichromate of soda with very little, if any, modification.

The witness Simon states (fol. 42) as follows :

> The physical properties of the two substances are in so far identical that they have the same color and are odorless and very soluble. In regard to chemical properties they are also identical as far as the main constituent, the chromic acid, is concerned. They are both salts, producing identical results, identical colors, or they act identically as oxidizing agents. * * * They are used mainly for dyeing, for producing certain pigments, and as oxidizing agents in batteries, etc., with identical results.

This witness also says that—

> They were both made from chrome ore, lime acid, etc., the materials being identical, substituting simply soda for potash, as the case might require.

Under the law and under the testimony it was legally impossible for the jury to have returned a valid verdict in plaintiffs' favor for the $364.27 specified in their protest, or for any other sum.

It is respectfully submitted that the court did not err, and that the judgment should be affirmed.

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